

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MITCHELL KEITH GOODRUM,

Case No.: 3:20-cv-00542-MMD-WGC

Plaintiff

## Report & Recommendation of United States Magistrate Judge

OVERLAND HOTEL AND CASINO,  
DAVID BARKLEY, DEANNA DOUGLAS,

Re: ECF No. 1-1, 3

## Defendants

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff, who is an inmate incarcerated within the Nevada Department of Corrections (NDOC), has filed an application to proceed in forma pauperis (IFP) (ECF No. 3) and pro se complaint (ECF No. 1-1). For the reasons stated below, the IFP application should be granted, and Plaintiff should be required to pay the \$350 filing fee over time; the section 1983 claims should be dismissed with prejudice as there is no state action, and the negligence claim should be dismissed for lack of jurisdiction.

## I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

1 The Local Rules of Practice for the District of Nevada provide: “Any person who is  
2 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].  
3 The application must be made on the form provided by the court and must include a financial  
4 affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

5 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some  
6 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
7 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the  
8 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

9 An inmate submitting an application to proceed IFP must also “submit a certificate from  
10 the institution certifying the amount of funds currently held in the applicant’s trust account at the  
11 institution and the net deposits in the applicant’s account for the six months prior to the date of  
12 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been  
13 at the institution for less than six months, “the certificate must show the account’s activity for  
14 this shortened period.” LSR 1-2.

15 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount  
16 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an  
17 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly  
18 deposits or the average monthly balance for the six-month period immediately preceding the  
19 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,  
20 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s  
21 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody  
22 of the prisoner will forward payments from the prisoner’s account to the court clerk each time  
23 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

1 Plaintiff's certified account statement indicates that his average monthly balance for the  
 2 last six months was \$0.03, and his average monthly deposits were \$0.03.

3 Plaintiff's application to proceed IFP should be granted. In light of his \$0.03 average  
 4 balance and deposits, he should not be required to pay an initial partial filing fee; however,  
 5 whenever his prison account exceeds \$10, he must make monthly payments in the amount of 20  
 6 percent of the preceding month's income credited to his account until the \$350 filing fee is paid.

7 **II. SCREENING**

8 **A. Standard**

9 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time  
 10 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--  
 11 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)  
 12 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
 13 § 1915(e)(2)(A), (B)(i)-(iii).

14 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if  
 15 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in  
 16 which a prisoner seeks redress from a governmental entity or officer or employee of a  
 17 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify  
 18 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--  
 19 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks  
 20 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

21 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
 22 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and  
 23 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a

1 complaint under these statutes, the court applies the same standard as is applied under Rule  
 2 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule  
 3 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232  
 4 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

5 The court must accept as true the allegations, construe the pleadings in the light most  
 6 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,  
 7 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less  
 8 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9  
 9 (1980) (internal quotation marks and citation omitted).

10 A complaint must contain more than a “formulaic recitation of the elements of a cause of  
 11 action,” it must contain factual allegations sufficient to “raise a right to relief above the  
 12 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading  
 13 must contain something more … than … a statement of facts that merely creates a suspicion [of]  
 14 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a  
 15 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at  
 16 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

17 A dismissal should not be without leave to amend unless it is clear from the face of the  
 18 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
 19 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
 20 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

21 **B. Plaintiff's Complaint**

22 Plaintiff sues the Overland Hotel and Casino located in Fallon, Nevada, as well as its  
 23 owner, David Barkley, and its employee Deanna Douglas under 42 U.S.C. § 1983 for violations

1 of his rights under the Eighth, Fourteenth and Sixth Amendments, and also for negligence under  
2 Nevada law.

3 Plaintiff alleges that he was charged with murder in March of 2017, and was tried in  
4 January of 2019, and sentenced in March of 2019, and is currently housed in Ely State Prison  
5 (ESP). The Overland Hotel and Casino is where the incident took place that led to the murder  
6 charge. David Barkley is the owner of the hotel. Deanna Douglas is an employee of the hotel,  
7 and was a witness to the incident and testified at Plaintiff's trial. All are located in Fallon,  
8 Nevada. Plaintiff alleges that Defendants conspired to give false testimony and evidence in  
9 connection with Plaintiff's trial.

10 § 1983 “‘is not itself a source of substantive rights,’ but merely provides ‘a method for  
11 vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490 U.S. 386, 393-94  
12 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). To obtain relief pursuant to  
13 section 1983, a plaintiff must establish a “(1) a violation of rights protected by the Constitution  
14 or created by federal statute, (2) proximately caused (3) by conduct of a ‘person’ (4) acting under  
15 color of state law.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

16 The complaint explicitly acknowledges that the actions were taken by private individuals  
17 working in a business. Therefore, there is no state action and the section 1983 claims against the  
18 Defendants should be dismissed with prejudice. There is no basis for the court to exercise  
19 jurisdiction over the remaining negligence claim; therefore, the negligence claim should be  
20 dismissed, though the dismissal should be without prejudice so Plaintiff may bring the claim in  
21 State court, if he desires.

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### **III. RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 3). Plaintiff should not be required to pay an initial partial filing fee; however, whenever his prison account exceeds \$10, he is required to make monthly payments in the amount of 20 percent of the preceding month's income credited to his account until the full \$350 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk should be directed to **SEND** a copy of an order adopting and accepting this Report and Recommendation to the attention of **Chief of Inmate Services for the Nevada Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

(2) The complaint (ECF No. 1-1) should be **FILED**.

(3) The section 1983 claims should be **DISMISSED WITH PREJUDICE**; the

negligence claim should be **DISMISSED WITHOUT PREJUDICE** so Plaintiff may raise the claim in State court, if he desires; and this action should be closed.

Plaintiff should be aware of the following:

1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of being served with a copy of the Report and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report and Recommendation” and should be accompanied by points and authorities for consideration by the district judge.

1       2. That this Report and Recommendation is not an appealable order and that any notice of  
2 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
3 until entry of judgment by the district court.

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5 Dated: April 8, 2021

6   
7 William G. Cobb  
8 United States Magistrate Judge

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